BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2017-305-E

IN RE: Request of South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920	)	**SCE&G'S MOTION FOR SUMMARY JUDGMENT AND IN THE ALTERNATIVE MOTION TO STRIKE**

INTRODUCTION

Pursuant to South Carolina Rule of Civil Procedure 56(c), and 10 S.C. Code Ann. Regs. 103-829, South Carolina Electric & Gas Company ("SCE&G" or the "Company") herein moves for summary judgment in the above-captioned docket, i.e., Request of South Carolina Office of Regulatory Staff ("ORS") for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920 ("Request"). As more fully explained below, ORS has failed to provide any evidence to meet its burden of proof under the requirements of S.C. Code Ann. § 58-27-920. Therefore, there is no genuine issue as to any material fact in the above-captioned proceeding, and SCE&G is entitled to summary judgment as a matter of law.

In the alternative, the testimony of ORS Witnesses Elizabeth H. Warner and M. Anthony James should be stricken in their entirety. Ms. Warner offers testimony as a records custodian only and presents no testimony regarding the contents, purpose, or relevance of any of the documents attached to her testimony, all of which are inadmissible hearsay. The testimony of Mr. James also should be stricken on the basis that it is nothing more than pure conjecture and hearsay and provides no foundation to prove he has first-hand knowledge of any of the information ORS seeks

to introduce into the record through his testimony. Finally, neither Ms. Warner nor Mr. James offer any evidence regarding the issues in this proceeding—whether ORS conducted a "preliminary investigation" and whether the proposed rates are "fair and reasonable" as required by S.C. Code Ann. § 58-27-920. The testimony and exhibits of Ms. Warner and Mr. James thus should be stricken as irrelevant, lacking proper foundation, and otherwise inadmissible hearsay, all in violation of the South Carolina Rules of Evidence.

LEGAL STANDARD

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 355, 559 S.E.2d 327, 336 (Ct. App. 2001).

Testimony is not admissible unless there is:

> a logical or rational connection between the fact which is sought to be presented and a matter of fact which has been made an issue in the case. It is necessary that the fact shown by the evidence offered legally tends to prove, or make more or less probable, some matter in issue and bear directly or indirectly thereon. If there is no such logical or rational connection between the fact sought to be presented and a matter of fact in issue in the case the evidence is immaterial and inadmissible.

Gause v. Livingston, 251 S.C. 8, 13, 159 S.E.2d 604, 607 (1968). "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Rule 602, SCRE.

Documents that may be tendered as business records do not qualify to be admitted unless they are:

> A record of an act, condition or event … [and] if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was

> made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

S.C. Code Ann. § 19-5-510 (2014); *see also* Rule 803(6), SCRE ("A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.").

However, even if a document could otherwise qualify as a "business record," "subjective opinions and judgments found in business records are not admissible," *Duncan v. Ford Motor Co.*, 385 S.C. 119, 137, 682 S.E.2d 877, 886 (Ct. App. 2009).

Finally, the well-settled law in South Carolina, which is consistent with the law in all other states, is that the existence of a fact or facts cannot rest on speculation, surmise, or conjecture. *Holland v. Georgia Hardwood Lumber Co.*, 214 S.C. 195, 205, 51 S.E.2d 744, 749 (1949).

ARGUMENT

I. ORS FAILED TO PRESENT ANY EVIDENCE WHATSOEVER THROUGH ITS DIRECT TESTIMONY TO SATISFY THE REQUIREMENTS OF S.C. CODE ANN. § 58-27-920

On September 26, 2017, ORS commenced this action by filing its Request in which it asks the Public Service Commission of South Carolina ("Commission") to suspend SCE&G's right to collect through its approved rates approximately $445 million in annual revenue. These revenues were previously authorized to be collected through SCE&G's rates to pay the financing cost associated with $3.8 billion in capital secured for the construction of Units 2 and 3 at the V.C.

Summer Nuclear Site (the "Units"). ORS explicitly based its Request to reduce SCE&G's rates upon the statutory authority set forth in S.C. Code § 58-27-920, which provides:

> The commission may, **after a preliminary investigation by the Office of Regulatory Staff** and upon such evidence as to the commission seems sufficient, order any electrical utility to put into effect **a schedule of rates as shall be deemed fair and reasonable**, within such time as may be prescribed by order of the commission, which shall be not less than fifteen days, and an attested copy of the order must be served upon the utility and the Office of Regulatory Staff by registered mail or otherwise as provided by law.

S.C. Code § 58-27-920; Request ¶9 (Emphasis added). By its plain language, a request under § 58-27-920 can only be made "after a preliminary investigation by" ORS and after evidence has been presented sufficient for the Commission to determine that the proposed rates are "fair and reasonable." As the party seeking relief under S.C. Code Ann. § 58-27-920, ORS therefore has the burden to demonstrate that it has satisfied the procedural requirements set forth in the statute and that the rates being proposed are "fair and reasonable."

With the burden of proof falling squarely on ORS's shoulders, on August 14, 2018, ORS submitted the testimony of just two witnesses: Elizabeth H. Warner, the Vice President of Legal Services and Corporate Secretary of the South Carolina Public Service Authority ("Santee Cooper") and M. Anthony James, Director of Energy Policy for ORS. The testimony of Ms. Warner is a mere two (2) pages long, and serves only to identify documents that are copies of documents contained in Santee Cooper records. *See* Direct Testimony & Exhibits of Elizabeth H. Warner ("Warner Testimony") at 1 ("The purpose of my testimony is to certify that the documents included in Exhibit A to my testimony are Santee Cooper records."). The testimony of Mr. James provides only cursory statements regarding why ORS is seeking to suspend the current revised rates, and then focuses solely on a discussion of the Bechtel Report and communications and information surrounding that report. Likewise, the exhibits attached to both Ms. Warner's and Mr.

James' testimony relate entirely to the Bechtel Report. Mr. James refers to the exhibits attached to Ms. Warner's testimony and also to certain exhibits attached to SCE&G's Response to Motion to Compel Discovery Responses and Production, which also relate entirely to the Bechtel Report.[1] All of these exhibits are inadmissible hearsay, have not been appropriately authenticated, and are otherwise speculative and untrustworthy.

Noticeably absent from any of the testimony or attached documents, however, is any discussion or analysis regarding whether ORS conducted a preliminary investigation or whether the rates that ORS seeks to have imposed on SCE&G are "fair and reasonable" as required by S.C. Code Ann. § 58-27-920. Instead, ORS only attempts to offer information suggesting that SCE&G failed to inform timely ORS and the Commission of an engineering evaluation of the construction of the Units that was performed in late 2015. S.C. Code Ann. § 58-27-920 does not permit the Commission to reduce an electric utility's rates as a penalty, as ORS requests, but requires that rates be set at "fair and reasonable" levels that meet constitutionally mandated standards. Therefore, in the absence of a *prima facie* showing that ORS has satisfied these statutory requirements or that it has met its burden of proof, SCE&G is entitled to have summary judgment issued in its favor.

A. ORS has failed to meet its burden to demonstrate that it conducted a "preliminary investigation" as required by S.C. Code Ann. § 58-27-920.

The plain language of S.C. Code Ann. § 58-27-920 mandates that requests under this statute

[1] As previously explained by SCE&G in its Response to Motion to Compel Discovery Responses and Production by SCE&G and Dominion Energy ("Response to Motion to Compel") dated June 11, 2018 in the above-captioned docket, SCE&G authorized counsel to hire Bechtel to assist in evaluating the project in anticipation of litigation against Westinghouse Electric Company LLC and Chicago Bridge and Iron (together, the "Consortium"). At the time the Bechtel presentation about its work was made in October 2015 to SCE&G and Santee Cooper representatives and when the preliminary and final Bechtel Reports were prepared, SCE&G believed these documents were subject to attorney-client privilege and work-product protection because SCE&G authorized Bechtel's evaluation at the request of counsel for anticipated litigation. So, disclosure of the presentation and the preliminary and final Bechtel Reports themselves were neither permitted nor required when they were prepared.

be based upon a "preliminary investigation" conducted by ORS. Neither the direct testimony of Mr. James nor Ms. Warner, however, contain any evidence, information, or reference whatsoever that such a "preliminary investigation" was conducted. Therefore, ORS has not met the statutory prerequisite to proceeding under § 58-27-920, and, on that fundamental basis alone, SCE&G is entitled to summary judgment as a matter of law on ORS's Request.

Although the Commission has previously determined that "ORS performed a preliminary investigation as required by § 58-27-920," Order No. 2017-769, this determination was made by the Commission during its consideration of the Company's September 28, 2018, Motion to Dismiss. *See McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994) ("[T]he denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings."). Notably, the Commission found that, in deciding this issue on a motion to dismiss, it was required to determine whether "the facts viewed in the light most favorable to ORS would entitle ORS to relief on any theory." Thus, while the Commission held at the motion to dismiss stage that "ORS has met the threshold test to allow the matter to continue before the Commission," this finding was only applicable to "whether, in the light most favorable to [ORS], and with every doubt resolved in [its] behalf, the [Request] states any valid claim for relief." *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). That holding at the motion to dismiss stage of the case is not the "law of the case" and therefore is not binding on the parties or the Commission. To sustain and advance the case, ORS remains obligated to tender evidence at the merits stage of the case to prove what may have been merely represented at the motion to dismiss stage.

SCE&G continues to believe that the Request did not even satisfy the motion to dismiss standard; however, at this merits stage, it is clear the Commission "should grant a motion for

summary judgment … and that the moving party is entitled to a judgment as a matter of law" when the evidence submitted by ORS through its direct testimony "shows 'there is no genuine issue as to any material fact.'" *Cothran v. State Farm Mut. Auto. Ins. Co.*, 421 S.C. 562, 567, 808 S.E.2d 824, 827 (Ct. App. 2017) (quoting Rule 56(c), SCRCP). Specifically, ORS's prefiled direct testimony is devoid of any evidence that it has conducted a "preliminary investigation" as required by S.C. Code Ann. § 58-27-920. While Mr. James obliquely refers to the analyses conducted by Baker Tilly Virchow Krause, LLP ("Baker Tilly"), neither Ms. Warner's nor Mr. James' testimony attach as exhibits the reports of Baker Tilly or of ORS's bankruptcy counsel,[2] and ORS did not offer any direct testimony from the individuals who prepared and developed these documents. Since neither of these reports existed in September 2017 when ORS filed the Request, they could not form the basis of a preliminary investigation in any event. Moreover, Mr. James states in his testimony that ORS's bankruptcy counsel "concluded the suspension of revised rates collections was unlikely to force SCE&G into bankruptcy," and that "ORS engaged the accounting firm of [Baker Tilly] to conduct an analysis that would be reported to the Commission." James Testimony at p. 7, ll.12-19. Mr. James is neither a bankruptcy lawyer nor an accountant and cannot sponsor into evidence either of the reports he mentions. He does not provide a suitable evidentiary foundation for the bankruptcy counsel report or how it was conducted, and does not offer an explanation of any kind describing the rigor, trustworthiness, or results of the Baker Tilly analysis.

[2] On January 19, 2018, ORS submitted to the Commission for inclusion in the docket of the above-captioned proceeding a report, which included memoranda drafted by Rick Mendoza, Esq. opining as to the likelihood SCE&G would be required to seek bankruptcy protection if the ORS Request were granted. On June 12 and 22, 2018, ORS also submitted to the Commission for inclusion in the docket of the above-captioned proceeding a report prepared by Baker Tilly, regarding the purported effects various rate scenarios would have on the Company. However, the submission of these documents to the Commission by filing them in the above-captioned docket does not constitute evidence that has been entered into the formal record of this proceeding. *See Bonaparte v. Floyd*, 291 S.C. 427, 444, 354 S.E.2d 40, 50 (Ct.App. 1987) (medical bills that were marked for identification but not proffered into evidence and never accepted into the record could not be used in the determination or consideration of the outcome); *Gold Kist, Inc. v. Citizens and Southern Nat'l Bank of South Carolina*, 286 S.C. 272, 333 S.E.2d 67 (Ct. App. 1985) (failure to set forth in the transcript a record of proffer of the evidence prevents consideration of error on appeal).

Lacking a sponsoring expert, the reports are rank hearsay and any reference to them is not evidence supporting ORS's duty to carry its burden of proof.

Because ORS has not made any evidentiary showing necessary to demonstrate that it has satisfied the requirements of S.C. Code Ann. § 58-27-920, SCE&G is entitled to summary judgment on the Request.

B. ORS has failed to meet its burden to demonstrate that the proposed rates are "fair and reasonable" as required by S.C. Code Ann. § 58-27-920.

Even assuming ORS conducted the necessary "preliminary investigation" required by S.C. Code Ann. § 58-27-920, SCE&G still is entitled to summary judgment on the Request on the basis that ORS failed to present any evidence demonstrating that the proposed rates are "fair and reasonable." The only statement about the effect upon SCE&G of suspending the revised rates in ORS's testimony is that of Mr. James who simply draws reference to the conclusions made by ORS's bankruptcy counsel that granting the Request would be unlikely to force SCE&G into bankruptcy.[3] Mr. James' testimony in this regard is objectionable hearsay and provides no evidence that the proposed rates would be "fair and reasonable" as statutorily required. The mere mention of the bankruptcy counsel report and the Baker Tilly analysis by Mr. James, who did not prepare them and does not have the expertise to testify to the trustworthiness or accuracy of the conclusions therein, is simply not evidence about the fairness or reasonableness of the rates that ORS seeks. *See* 10 S.C. Code Ann. Reg. 103-845.C ("A witness may read into the record, as his direct testimony, statements of fact or expressions of his opinion prepared by him …") (emphasis supplied). Furthermore, without rejection of this improper testimony, SCE&G will be denied its

[3] It is also very clear that the constitutional mandates of *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) and *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) are not met merely by suggesting that the requested rate reductions are "unlikely to force SCE&G into bankruptcy."

constitutional right to confront and cross examine adverse testimony or challenge unreliable and inaccurate conclusions, which is crucial for any evidentiary-based determination. *See Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007) (""Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses."). Thus, to the extent that the testimony of Mr. James attempts to suggest that the report of ORS's bankruptcy counsel and the Baker Tilly report amount to proof that the proposed rate reduction will result in fair and reasonable rates for SCE&G, there is absolutely no evidence to support Mr. James' suggestion. ORS has entirely failed to present the reports or any witnesses that are competent to testify about the analysis conducted, the trustworthiness of the work performed, and the conclusions reached.

SCE&G also notes that, even if ORS had offered testimony from its bankruptcy counsel or from individuals at Baker Tilly, that testimony could not have meaningfully addressed the issue of whether the rates ORS seeks are "fair and reasonable," as neither of the reports even touch on this issue. The constitutional standard for whether rates meet the "fair and reasonable" or "just and reasonable" threshold is set forth in *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) ("*Hope*") and *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) ("*Bluefield*").[4] The bankruptcy counsel report referenced

[4] *See Hope* at 603 ("From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with the returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."); *Bluefield* at 692-93 ("The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and

by Mr. James merely speculates about whether SCE&G will be required to file for bankruptcy protection if the rate reductions ORS seeks are implemented; however, it does not offer an expert opinion about what rates are necessary to meet the constitutionally mandated standards of fairness and reasonableness required under American jurisprudence for utility ratemaking. Similarly, the Baker Tilly report speculates about what might happen with respect to SCE&G's finances under eight different scenarios; however, it too fails to address whether any of the scenarios result in fair and reasonable rates.

Indeed, at no point in this docket has ORS provided any evidence about the fairness and reasonableness of the rates it proposes. Rather than offer substantive evidence or testimony on this issue, ORS has been content—from the time it filed its initial Request in this case through the submission of its direct testimony on August 14—to merely suggest that the Bechtel Report is evidence of imprudence, hoping this will distract the Commission from its obligation to carefully analyze the financial impact of ORS's Request on the Company and whether it complies with the requirements of § 58-27-920. SCE&G has and continues to assert that the conclusions ORS has drawn from the Bechtel Report are simply wrong and ignore the evidence contemporaneously available to ORS throughout construction of the Units. Nevertheless, one thing is certain—for all of ORS's focus on it, the Bechtel Report simply has nothing to do with whether the rates that ORS seeks to have imposed on SCE&G in this case are "fair and reasonable."

The reason why ORS has completely failed to address this question should by now be apparent to the Commission—ORS cannot meet its burden. As SCE&G has shown through its previous filings in the above-captioned matter, the rate reductions requested by ORS would harm SCE&G, deprive it of access to essential operating capital, diminish its rates of return to

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should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.").

confiscatory levels, set rates at levels that are unfair and unreasonable, and potentially deprive the customers of SCE&G of efficient and reliable electric service.[5] ORS has avoided offering any analysis at all contradicting the Company's analyses or demonstrating the fairness and reasonableness of the rates ORS proposes. Instead, ORS has left the Commission to grapple with the legal requirements embodied in § 58-27-920 on its own and without any evidence to support the rate reductions ORS is advancing.

In summary, none of the evidence offered by ORS addresses the question of whether the rates ORS advances are in fact fair and reasonable. Under the well-established rules for proceedings before the Commission, as well as the procedural orders issued in this case, ORS is now precluded from offering further testimony in support of its position in this docket, if it ever planned to do so. Therefore, the testimony of ORS submitted on August 14, 2018 to the Commission on the merits of ORS's rate reduction case is the evidence upon which ORS must stand to carry its burden of proof. And from a most careful review of that testimony, it is clear that ORS has failed to meet its burden, that there is therefore no genuine issue as to any material fact, and that SCE&G is entitled to summary judgment as a matter of law.

C. ORS is precluded by Commission Regulations and Orders issued in this proceeding from presenting additional evidence in support of its case in chief.

Commission regulations and procedural orders issued in this docket also demonstrate that it is appropriate to grant summary judgment at this stage. Clearly established procedures for proceedings before the Commission dictate that, "[i]n proceedings involving utilities, the Commission shall require any party and the Office of Regulatory Staff to file copies of testimony and exhibits and serve them on all other parties of record within a specified time in advance of the

[5] *See* Aff. of Robert B. Hevert at 4-5, 51-60 (attached as Ex. 2 to SCE&G's Reply Br. in Supp. of its Mot. to Dismiss, Docket No. 2017-305-E (Dec. 12, 2017) ("SCE&G Reply Br."); Aff. of Ellen Lapson at 3-23 (attached as Ex.3 to SCE&G Reply Br.).

hearing." 10 S.C. Code Ann. Regs. 103-845(C). In addition, the Hearing Officer in this proceeding required that:

> ORS and any Party of Record supporting ORS[6] in Docket No. 2017-305-E must file with the Commission one (1) copy of the direct testimony and exhibits of the witnesses it intends to present and serve the testimony and exhibits of the witnesses on all Parties of Record on or before August 14, 2018 (must be post-marked on or before this date).

Order No. 2018-81-H at 4. The Hearing Officer further set forth the unequivocal and well-established legal requirement that "[e]ach Applicant or Petitioner must bear the burden of proof of the issues in its own initiated Docket." *Id.* at 5. The import of these requirements is clear and simple: it was incumbent upon ORS to prefile and serve in this docket the direct testimony of its witnesses setting forth all of the evidence it intended to present to meet its burden of proof no later than August 14, 2018. As previously stated, ORS's testimony is wholly insufficient to meet its burden of proof in this matter. Moreover, ORS cannot now try to cure this fatal defect by attempting to offer additional evidence either before or during the hearing in this matter. Because ORS failed to present any evidence to meet its burden of proof on the merits under § 58-27-920 by the procedural deadline set by the Commission, SCE&G therefore is entitled to summary judgment.

II. IN THE ALTERNATIVE, THE TESTIMONY OF MS. WARNER AND MR. JAMES SHOULD BE STRICKEN

Alternatively, SCE&G moves to strike all or portions of the testimony and exhibits of Ms. Warner and Mr. James on one or more of the following grounds: (1) the witness does not purport to have personal knowledge of the testimony being tendered, (2) hearsay, (3) lack of foundation, (4) lack of trustworthiness, and/or (5) irrelevance.

[6] No party of record filed any evidence in support of ORS's petition in this docket.

Commission regulations provide that "[t]he rules of evidence as applied in civil cases in the Court of Common Pleas shall be followed." 10 S.C. Code Ann. Regs. 103-846.A. Prefiled testimony therefore is subject to Rule 602 of the South Carolina Rules of Evidence ("SCRE"), which provides, in part, that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Rule 602 "embodies one of the most fundamental tenets of a rational system of evidence law; testimony should be reliable and, thus, must be based on the perceptions of the witness rather than conjecture or second-hand information." Charles A. Wright & Victor J. Gold, 27 Fed. Prac. & Proc. Evid. § 6021 (2d ed.). *See also* 1 McCormick On Evid. § 10 (7th ed.) ("The burden of laying a foundation by showing that the witness had an adequate opportunity to observe is upon the party offering the testimony."); *cf State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009) ("In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability [of expert testimony, whether scientific or non-scientific] and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.").

Contrary to these well-established rules, the testimony of Mr. James makes no attempt to lay a foundation demonstrating he has personal knowledge of the information he seeks to present. His mere reference to certain documents prepared by others from which he draws unfounded conclusions shows clearly that he does not have the requisite knowledge of the underlying facts. Additionally, the exhibits he references reflect communications between or documents prepared, not by Mr. James, but by persons who are not witnesses or parties to this docket. Thus, the testimony of Mr. James constitutes inadmissible hearsay and reflects an improper attempt by ORS

to advance through Mr. James a "secondhand version of the facts … [that] is unreliable because the witness[es] cannot meaningfully be cross-examined concerning those facts." Charles A. Wright & Victor J. Gold, 27 Fed. Prac. & Proc. Evid. § 6022 (2d ed.). *See also* Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

Mr. James states that he has training as an engineer but does not indicate that he has any expertise as a bankruptcy lawyer or as an auditor or accountant. Moreover, he provides no basis, evidence, or support of how the calculations, analysis, or audits of the Company's books and records were conducted by bankruptcy counsel or Baker Tilly. While an individual who may have some expertise in one field may rely on scientific, technical or other specialized knowledge in that field of study, *see*, *e.g.*, S.C. R. Evid. 702, that principle does not transform a witness from a person with knowledge or skill in one area into a person with knowledge and skill about other subject matters simply by relying on the work of another person. Therefore, Mr. James' testimony referencing the report of ORS's bankruptcy counsel and the analysis conducted by Baker Tilly must be excluded from the evidence of record in this matter as pure speculation, rank hearsay, unreliable, and not within his personal knowledge or expertise.

Furthermore, the testimony of Mr. James with respect to his opinions as to SCE&G's purported motivations for asserting that the Bechtel Report was protected from disclosure amounts to inadmissible lay opinion and pure speculation. Mr. James fails to establish any foundation demonstrating he has personal knowledge for such purported motivations and, thus, his testimony amounts to nothing more than conjecture, speculation, and inadmissible lay opinion. *See Jaramillo v. Adams County School Dist. 14*, 680 F.3d 1267, 1270 (10th Cir. 2012). Although Rule 701, SCRE permits lay witnesses to offer opinion testimony when such testimony is rationally related to the

witness's perception, "a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." *Watson v. Ford Motor Co*., 389 S.C. 434, 445–46, 699 S.E.2d 169, 175 (2010).

Ms. Warner's direct testimony is offered solely as a records custodian of Santee Cooper to authenticate exhibits attached to her testimony. However, she provides no testimony explaining the contents, purpose, or source of any of the documents attached to her testimony, who prepared them, or why they pertain to the central issue in this docket—whether the rates proposed by ORS are "fair and reasonable." *See* Rule 402, SCRE ("Evidence which is not relevant is inadmissible").

Instead, it is apparent that, by offering Ms. Warner as a witness "to certify that the documents" attached to her testimony "are Santee Cooper records," ORS is attempting to introduce these exhibits as either a "business record" of regularly conducted activity pursuant to Rule 803(6), SCRE and S.C. Code Ann. § 19-5-510, or as a public record or report pursuant to Rule 803(6), SCRE.[7] However, these documents do not satisfy either of these exceptions. At the outset, these documents do not constitute "business records." Instead, they merely consist of email communications, draft reports, and unidentifiable documents that do not reflect "record[s] of an act, condition or event," *see* S.C. Code Ann. § 19-5-510 (2014), or "memorand[a], report[s], record[s], or data compilation[s], in any form, of acts, events, conditions, or diagnoses." Rule

[7] SCE&G notes that Ms. Warner identifies her exhibits as "official records." Although Rules 901(b)(7), 902(4), and 1005, SCRE refer to offering "official records" as evidence, in each instance, the rules address the *authentication* and *identification* of such documents, and whether the original of such a document is required. Even if deemed to be authentic and sufficiently identified, however, such "official records" must still meet the requirements of *admissibility* to be included in the evidence of record. *See* Rule 901(b)(a), SCRE ("The requirement of authentication or identification *as a condition precedent to admissibility* …") (emphasis added); Rule 902, SCRE ("Extrinsic evidence of authenticity *as a condition precedent to admissibility* …") (emphasis added); Rule 1005, SCRE ("The contents of an official record … *if otherwise admissible* …") (emphasis added); Rule 44(a)(1), SCRCP ("An official record or an entry therein, *when admissible for any purpose* …") (emphasis added). Because the documents sponsored by Ms. Warner are hearsay, do not satisfy any of the hearsay exceptions set forth in the South Carolina Rules of Civil Procedure, and do not meet the requirements of S.C. Code Ann. § 19-5-510, they therefore are inadmissible.

803(6), SCRE. Nor do these documents contain "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to a duty imposed by law as to which matters there was a duty to report." Rule 803(8), SCRE. ORS therefore has failed to establish the necessary foundation for the introduction of these documents required by Rules 803(6) and (8), SCRE and S.C. Code Ann. § 19-5-510. *See State v. Davis*, 371 S.C. 170, 178–79, 638 S.E.2d 57, 62 (2006) (stating the proponent of evidence has the burden of establishing that a record falls within a hearsay exception).

However, even if the documents can be considered "business records," which SCE&G disputes, Ms. Warner advances no testimony demonstrating that these purported business records were:

> (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court."

Ex parte Dep't of Health & Envtl. Control, 350 S.C. 243, 249–50, 565 S.E.2d 293, 297 (2002) citing Rule 803(6), SCRE and S.C. Code Ann. § 19-5-510 (Supp.2001); *see also State v. Rice*, 375 S.C. 302, 330–31, 652 S.E.2d 409, 423 (Ct.App.2007) ("A business record without evidence about the manner in which it is prepared or the source of its information does not meet the requirements in either section 19–5–510 or Rule 803(6), SCRE."), *overruled on other grounds by State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011). Additionally, the proposed exhibits are wholly comprised of "subjective opinions and judgments … [that] are not admissible." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 137, 682 S.E.2d 877, 886 (Ct. App. 2009). *See also* Rule 803(6), SCRE ("[S]ubjective opinions and judgments found in business records are not admissible."); *Kershaw Cty. Dep't of*

Soc. Servs. v. McCaskill, 276 S.C. 360, 362, 278 S.E.2d 771, 773 (1981) ("The exceptions to the Hearsay Rule enumerated in … the Business Records as Evidence Act are limited in scope and do not extend to subjective opinions or judgments which might be found in a business record"); *In re Care & Treatment of Harvey*, 355 S.C. 53, 62, 584 S.E.2d 893, 897 (2003) (finding a log book "replete with subjective opinions and judgments" and offering judgments about medical treatment and diagnoses was inadmissible hearsay).

In summary, the testimony and exhibits of Ms. Warner and Mr. James must be stricken because they are founded on speculation, amount to rank hearsay, are otherwise unreliable, and would allow ORS to present false and misleading interpretations of events by persons that are not witnesses and, therefore, not subject to cross-examination. These are exactly the evidentiary abuses that Rules 402, 602, and 802 were designed to prevent. Thus, the testimony and exhibits must be stricken or otherwise barred from introduction into the record of this proceeding.

CONCLUSION

For the reasons stated above, SCE&G respectfully requests that the Commission grant summary judgment to SCE&G and, in the alternative, that the Commission strike the testimony and exhibits of ORS Witnesses Warner and James. SCE&G further requests that the Commission grant such other and further relief as is just and proper.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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